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Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~498~~ //

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents.

BRIEF FOR PETITIONERS.

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No. 498

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners,

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GERTRUDE PICARD CUSHING, et al.,
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BRIEF FOR PETITIONERS.

I

OPINIONS BELOW

The opinion of the District Court (Tr 11-17) is reported at 99 FS 681, 1951 AMC 1878. The original opinion of the Court of Appeals (Tr 29-34) is reported at 198 F2d 936, 1952 AMC 1803. Judge Rives' dissenting opinion on denial of rehearing (Tr 45-47) is reported at 198 F2d 1021, 1952 AMC 1803.

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II

JURISDICTION

Jurisdiction of the court was invoked by petition for certiorari under 28 USC 1254(1). Certiorari was granted on March 9, 1953.

III

STATEMENT OF THE CASE

Petitioners are the marine protection and indemnity underwriters of the owner and bare-boat charterer of the Towboat JANE SMITH.[1] Respondents are the representatives of five members of her crew, lost when the vessel capsized and sank following collision with a railway bridge spanning the Atchafalaya River in Louisiana.

The owner and charterer of the towboat filed consolidated petitions in admiralty for limitation of liability. Injunctions were issued in the limitation proceeding restraining institution elsewhere than in that proceeding, of actions against the owner and charterer of the vessel. Respondents filed claims in the limitation proceeding against both owner and charterer, for damages for their decedents' deaths.

Thereafter, however, enjoined from suing the shipowner and charterer elsewhere than in the limitation

[1] The policy of The Home Insurance Company insures both owner and charterer. The separate policy of Maryland Casualty Company, by marine endorsement, runs in favor of the charterer (employer) only.

proceeding in admiralty, respondents filed the present actions at law against petitioners as underwriters of the shipowner and charterer, under a Louisiana statute which creates a direct right of action against liability insurers of tortfeasors generally,[2] to enforce independent recovery against the underwriters, on the claims already filed against the owner and charterer in the limitation proceeding.

Each of the marine policies involved contains a clause prohibiting suit against the underwriter until after the assured shall actually have paid a loss, or shall have had his liability determined judicially.

The district judge dismissed the actions,[3] holding that the Legislature of Louisiana obviously did not intend its direct-action statute "to be applicable to marine insurance"; that "the value of the interest to be surrendered in limitation under our law is the value after the collision", and that under this court's opinion in *The City of Norwich,* 118 US 468, "the shipowner is then free to claim the insurance money as his own"; that Congress, "under its constitutional prerogative to provide laws affecting admiralty and maritime jurisdiction, has occupied the field of limitation of liability including contracts of insurance as they relate to the same"; and that "to give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general

[2] Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655, reprinted in Appendix A, *post,* p. 20.
[3] Tr. 11-18; 99 FS 681.

maritime law, but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act".

The district court's judgment of dismissal was reversed by the Court of Appeals for the Fifth Circuit,[4] which held that the Louisiana direct-action statute is legislatively intended to apply to marine policies; that although the statute confers "upon an injured party a substantive right', nothing therein "undertakes to change the substantive admiralty law"; that construction of the statute to support jurisdiction over these actions is not precluded by the Jones Act, nor by pendency of the proceeding in admiralty for limitation of liability; and that the state statute is valid, in any event, under the McCarran Act.

Application for rehearing was denied without opinion by a majority of the Court of Appeals, Judge Rives dissenting in a written opinion[5] in which he stated: "A reconsideration of this case compels me to agree with the opinion of the learned district judge . . . that in the enactment of the Louisiana direct-action statute . . . the Legislature of that State did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government"; that, in any event, "the Louisiana direct-action statute cannot constitutionally be construed to cover Marine insurance policies in such manner as to nullify Congressional policy limiting a shipowner's liability"; that these principles were "not changed by the McCarran Act" which "was never intended to validate

[4] Tr. 29-34; 198 F2d 536.
[5] Tr. 45-47; 198 F2d 1021.

state law contravening provisions of the constitution other than the commerce clause"; and that under the opinion of this court in *The City of Norwich*, "the Louisiana direct-action statute cannot operate to restrict the shipowner's freedom to contract through insurance for his own protection and still to avail himself of the limitation of his liability under the Federal statute".

IV

SPECIFICATION OF ERRORS

The Court of Appeals erred in holding that the Louisiana direct-action statute is intended to apply to marine policies; and that such application thereof is permissible

a—Despite the exclusive constitutional federal jurisdiction over maritime matters, and the pendency of limitation-of-liability proceedings instituted by petitioners' assureds;

b—In actions brought by survivors of deceased seamen against the seamen's employer, despite provision by the Jones Act of another, exclusive, remedy;

c—In any event, under the McCarran Act.

V

ARGUMENT

A

The Louisiana direct-action statute is by its own terms inapplicable to marine insurance.

The legislature of Louisiana, apparently recognizing the State's constitutional impotence to apply its direct-action statute to maritime causes of action, expressly provided that it was not to have such application, as the district court and the dissenting judge of the Court of Appeals both held.[6]

The Louisiana direct-action statute is contained in Part XIV of the Louisiana Insurance Code.[7] Section 611, at the head of the same Part, declares unequivocally that "the applicable provisions of this Part shall apply to insurances other than ocean marine".[8]

In ignoring this plain pronouncement, the majority of the Court of Appeals must simply have failed to realize

[6] Respondents' contention below, and in their opposition to certiorari in this court, that the Louisiana Supreme Court has "held the Louisiana direct-action statute applicable in maritime matters", is incorrect. In the only case cited to support the statement, the Supreme Court expressly reserved decision on the question. *Department of Highways vs Lykes Bros. SS Co.*, 209 La. 381, 393 (1945).

[7] Louisiana Revised Statutes of 1950, Title 22, section 655, reprinted in Appendix A, *post*, p. 20.

[8] It is also worthy of note that the direct-action statute applies, by its terms, only to policies of "liability insurance", and that section 6 of the Louisiana Insurance Code clearly distinguishes between insurance against marine risks of all types [subparagraph (13)], and "liability insurance" so defined [subparagraph (4)], which can obviously include only policies on terrene risks.

that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not Inland Marine insurance at all, but Ocean Marine business'."[9]

B

Application of the Louisiana direct-action statute to the actions at bar would transgress the federal constitution by impairing the obligations of maritime contracts, infringing substantive features of the general maritime law, and abridging the scope of the national Limited-Liability Act.

At the outset of discussion of the constitutional issues, it should be noted that the judges of the Court of Appeals for the Fifth Circuit are in open disagreement with respect to the broad questions presented. The decision now under review, in which Judges Holmes and Strum concurred and from which Judge Rives dissented, cannot be reconciled with the later unanimous decision, by Judges Rives, Hutcheson and Borah of the same court, in *Wilburn Boat Company vs Fireman's Fund Insurance Company*, [10] that a state (Texas) statute may not impair otherwise valid provisions of marine insurance policies.

Entertainment of jurisdiction over the instant proceedings under a state statute which eliminates from the marine policies involved their clauses prohibiting institution of such direct actions, effects state impairment of mari-

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[9] *National Underwriter Service*, FC&S Bulletins, Inland Marine, Aa-1, April, 1939. The term "ocean marine" like "wet marine", is used to distinguish true marine insurance from so-called "inland-marine" or land transportation insurance, which does not cover marine or water-borne risks at all, but only fire, theft and related lines. 4 *Appleman, Insurance* 4, 5, sec. 2104. *Winter*, in his leading work on *Marine Insurance*, states (p. 117) that this subject does not include "what is improperly, due to lack of a better name, known as *Inland Marine* insurance".

[10] 201 F2d 833 (CA 5-1953).

time contracts, a drastic change in substantive maritime law, and destruction of the nation-wide uniformity of important features of that system.[11]

It has been held directly by this court and by the Court of Appeals for the Second Circuit, that state laws are powerless to alter the terms of maritime contracts, made in contemplation of the general admiralty law.[12]

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[11] The policy of Maryland Casualty Company here involved is a composite or mixed one, covering several distinct risks. The coverage in suit, by a separate marine endorsement, is against liability for injuries in maritime employment. Such coverage is marine insurance. *New York & Cuba Mail SS Co. vs Continental Ins. Co.*, 117 F2d 404 (CA 2-1941), cert. den., 313 US 580; 1 *Arnould, Marine Insurance* (13th ed.) 240, sec. 250. "When a wrong has resulted in personal injury or death to a human being, either upon inland waters of a country, or upon the high seas, the question of the liability of the actor, the ship or her owner is subject to the admiralty jurisdiction". *Benedict on Admiralty* (5th ed.), sec. 61. Marine insurance is that in which "the insurer assumes risks which are marine risks". *Jeffcott vs Aetna Ins. Co.*, 129 F2d 582 (CA 2-1942), cert. den., 317 US 663. It is well settled that the severable maritime portions of a mixed contract are cognizable in admiralty and are governed by maritime principles. *Berwind-White Coal Mining Co. vs City of New York*, 135 F2d 443 (CA 2-1943); *Eastern Massachusetts Street Ry. Co. vs Transmarine Corp.*, 42 F2d 58 (CA 1-1930), cert. den., 282 US 883; *Compagnie Francaise vs Bonnasse*, 19 F2d 777 (CA 2-1927), cert. den., 275 US 551. It is equally clear that the mere fact that certain incidental conditions and stipulations apply to both land and marine aspects of a policy is immaterial. *American Stevedores vs Porello*, 330 US 446, 456 (1947); *Rosenthal vs The Louisiana*, 37 Fed. 264 (CC La.-1889); *Benedict on Admiralty* (5th ed.), sec. 63. It follows that the Maryland policy, insofar as it applies to liability for maritime injuries, is a maritime contract, enforceable as such.

[12] *Union Fish Co. vs Erickson*, 248 US 308 (1919); *Rodgers & Hagerty vs City of New York*, 285 Fed. 362 (CA 2-1922), cert. den., 261 US 621. In *Jarka Corp. vs Hellenic Lines*, 182 F2d 916, 919 (CA 2-1950), which respondents cited below apparently as establishing a contrary rule, a provision of state law was applied on the express ground that it was "not in conflict with any essential feature of the general maritime law". Language in the opinion expressing doubt as to the supremacy of maritime law in marine causes must be considered disapproved by the later decision of the same court in *W. E. Hedger Transp. Corp. vs United Fruit Co.*, 198 F2d 376 (CA 2-1952); and has, in any event, been strongly criticized as contrary to the ever-growing maritime and commercial need "for a uniformity of obligation" without regard to state boundaries. *Note*, 36 *Cornell L. Quar.* 355, 360 (1951). *Standard Dredging Corp. vs Murphy*, 319 US 306 (1943), cited by respondents in their opposition to certiorari in this court, did not involve marine insurance at all, but public unemployment compensation.

Both before and after rendition of the decision under review, other panels of the Court of Appeals for the Fifth Circuit itself have held directly that marine policies are "governed by the general admiralty law and not by the law of"[13] any state; and that since a marine policy "is 'derived from', is 'governed by', and is a 'part of' the general maritime law of the world", a "suit which challenges the validity and effect of the terms of (such) a maritime contract does involve a characteristic feature of substantive admiralty law", to which "state law is inapplicable whatever it may be"[14]

It is palpably of the utmost importance to the interests of navigation and of maritime commerce that the uniform construction of marine policies—crystallized through centuries of usage—be preserved from the vagaries of state legislation.[15] This is a matter of no mere local concern.[16]

The reliance of the majority of the court below on *Red Cross Line vs Atlantic Fruit Co.*[17] is obviously misplaced. That opinion merely upheld procedural enforcement, pursuant to state law, of an arbitration clause voluntarily included in a maritime contract, and sub-

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[13] *Aetna Ins. Co. vs Houston Oil & Transp. Co.*, 49 F2d 121, 124 (CA 5-1931), cert. den., 284 US 628.

[14] *Wilburn Boat Co. vs Fireman's Fund Insurance Co.*, 201 F2d 833, 837 (CA 5-1953).

[15] "Modern industrial development and transportation, which minimize the economic importance of state boundaries, argue for a uniformity of obligation. This uniformity is in large measure the aim of current activity in the field of commercial law . . . Determining the validity of a maritime contract by varying state law is out of line both with precedent and with modern commercial needs." *Note*, 36 *Cornell L. Quar.* 355, 360 (1951).

[16] "A successful blow at the doctrine (of maritime uniformity) would, I venture to say, shatter the whole fabric of our admiralty and maritime system." *Wright, Uniformity in the Maritime Law of the United States*, 73 *U. of Pa. L. Rev.* 123, 223, 255 (1925). See also *Stevens, Erie RR vs Tompkins and the Uniform General Maritime Law*, 64 *Harv. L. Rev.* 246 (1950).

[17] 264 US 109 (1924).

stantively valid under admiralty law.[18] The instant decision of the Court of Appeals, on the contrary, permits nullification of otherwise valid "no-action" clauses in marine policies through enforcement of a concededly substantive right of action created by state statute [19]—a right certainly not sanctioned by the maritime law.[20]

Application of such state statutes to govern maritime causes of action obviously effects a drastic and unconstitutional change in the substantive aspects of that law.[21]

Further, in view of the practically universal marine insurance coverage of shipowners throughout the nation, it is apparent that if direct-action statutes were applicable in maritime causes, the Limited-Liability Act,[22] which

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[18] In their very recent opinion in *Wilburn Boat Co. vs Fireman's Fund Insurance Co.*, 201 F2d 833, 837, rendered January 29, 1953, another panel of judges of the Court of Appeals for the Fifth Circuit distinguished *Red Cross Line vs Atlantic Fruit Co.*, as being simply one "of the instances in which the courts have held that state law, as construed and applied, did not interfere with any characteristic feature of the maritime law".

[19] While the Court of Appeals said that "there is nothing in" the Louisiana direct-action statute "which undertakes to change the substantive admiralty law", it was constrained to hold that the act "confers upon an injured party a substantive right" against the tortfeasor's insurer. In *Lewis vs Manufacturers Casualty Insurance Co.*, 107 FS 465, 469 (WD La.-1952), Judge Porterie stated that the Louisiana direct-action statute "has been declared so many times to be substantive by final authority that we deny this phase of defendant's motion without elaboration by merely citing the latest case on the point"—the instant majority opinion of the Court of Appeals. See also *New Amsterdam Casualty Co. vs Soileau*, 167 F2d 767 (CA 5-1948), cert. den., 335 US 822.

[20] *The City of Norwich*, 118 US 468 (1886); *The Donald T. Wright*, 30 FS 610 (WD Ky.-1939).

[21] *Garrett vs Moore-McCormack Co.*, 317 US 239 (1942); *The Lottawanna*, 21 Wall. 558 (1874); *Payne vs Jacksonville Forwarding Co.*, 290 F2d 936 (CA 5-1923); *Jansson vs Swedish American Line*, 185 F2d 212 (CA 1-1950); *W. E. Hedger Transp. Corp. vs United Fruit Co.*, 198 F2d 376 (CA 2-1952); *Hawn vs Pope & Talbot*, 198 F2d 800 (CA 3-1952); *Hall-Scott Motor Car Co. vs Universal Ins. Co.*, 122 F2d 531 (CA 9-1941), cert. den., 314 US 690; *The Thielbek*, 241 Fed. 209 (CA 9-1917), cert. den., 245 US 661.

[22] 46 USC 183-189, reprinted in part in Appendix B, *post*, p. 21. See also Rules 51 to 54, inclusive, of this court's *Rules of Practice in Admiralty and Maritime Causes.*

"was enacted by Congress as a part of the maritime law of this country, and therefore is co-extensive, in its operation, with the whole territorial domain of that law",[23] would become a dead letter in the one or two direct-action states alone.[24] Injured parties in those states would circumvent the Federal Limitation of Liability Act just as the instant claimants are attempting to do, by proceeding against marine underwriters directly.

A more striking abridgement of the doctrine of maritime uniformity can hardly be conceived: "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish".[25]

C

Pendency of limitation-of-liability proceedings instituted by petitioners' assureds, precludes application of the Louisiana direct-action statute to the actions at bar, by reason both of that statute's own provisions and of the intendment of the national Limited-Liability Act.

1

Bar of the Louisiana Direct-Action Statute

The pending limitation proceeding brought by the assured owner and charterer concededly bars independent

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[23] *Butler vs Boston Steamship Co.*, 130 US 527, 555 (1889).

[24] While a number of states authorize direct actions against liability insurers after judgment has been obtained against the assured, and some states permit direct actions against automobile liability insurers without prerequisite suit against the assured, it is believed that only the statute of South Dakota (Code of 1939, Section 31.3106) may be broad enough to sanction, as does the Louisiana act, direct actions in some classes of cases against insurers of liability arising otherwise than from operation of motor vehicles, without prerequisite suit against the assured.

[25] *Southern Pacific Co. vs Jensen*, 244 US 205, 217 (1917). "Disagreement over the Constitutional issues of the cases in the Jensen line has not extended to this principle." Mr. Justice Black in *Garrett vs Moore-McCormack Co.*, 317 US 239, 245 (1942).

suit against them by the instant respondents on the causes at bar. Under the Louisiana direct-action statute, which "merely gives a right of action against the insurer when the claimant has a cause of action against the insured",[26] the insurer may plead—against the injured party—all defenses of the assured [27] except purely personal ones, completely independent of the alleged tort, such as interspousal immunity.[28]

The bar of the limitation proceeding is not a personal matter between the assureds and any particular respondent, arising from some peculiar relation between them independently of the accident in suit, but is a defense against the claims of all parties injured in the instant casualty—a defense which "arose out of" and is "connected with, the accident".[29]

2

Federal Bar of Surrender of Insurance into the Limitation Fund

The decision under review conflicts with this court's emphatic declaration that to "compel the shipowner to surrender his insurance in order to have the benefit of limited liability . . . would defeat the principal object

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[26] *Graham vs American Employers' Ins. Co.*, 171 So. 471, 476 (La. App.-1937). See also *Burke vs Massachusetts Bonding & Ins. Co.*, 209 La. 495 (1946).

[27] *Ruiz vs Clancy*, 182 La. 935 (1935); *Dandridge vs Fidelity & Casualty Co.*, 192 So. 887 (La. App.-1939). "Ordinarily, when an insured's immunity from an action is absolute, there likewise can be no action against the insurer." Hamiter, J., in *Stephenson vs List Laundry & Dry Cleaners*, 168 So. 317, 320 (La. App.-1936), aff'd, 186 La. 11.

[28] *Edwards vs Royal Indemnity Co.*, 182 La. 171 (1935).

[29] *Id.*, at 180, 181.

of the law", which was to encourage the merchant marine.[30]

While the cited case involved hull insurance, the principle is obviously the same as that here concerned. The purpose of both hull and P&I coverage is to indemnify an insured shipowner for his own losses, not to provide a fund for claimants in his limitation proceeding.[31]

To allow marine insurance protection to be drained away by direct actions under state law, may deprive the shipowner of the benefits of limitation of liability under federal law as effectively as if he were required expressly by state law to surrender the full amount of his P&I coverage, as well as his vessel, into the federal limitation fund.

3

Bar of the Federal Limited-Liability Act

The effect of the initiation of limitation proceedings by petitioners' assureds is that "the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive",[32] and that those proceedings

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[30] *The City of Norwich*, 118 US 468, 504 (1886).

[31] "It is true that in *The City of Norwich*, the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in *The City of Norwich* that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance." Wright, DJ, in *Cushing vs Texas & P. Ry. Co.*, 99 FS 681, 684, quoted with approval by Rives, Cct. J., in his dissent in the Court of Appeals, 198 F2d 1021, 1022.

[32] *The San Pedro*, 223 US 365, 372 (1912). The claims which cannot thereafter be asserted elsewhere are those for "any and all debts and liabilities of the owner, incurred on account of the ship". Id., at p. 376.

"supersede all other actions and suits for the same loss or damage in the state and federal courts".[33]

This court has repeatedly declared that the jurisdiction of limitation proceedings must necessarily be exclusive, if the primary ends of the limitation statute are not to be thwarted.[34] Entertainment of jurisdiction over the actions at bar would create the very multiplicity of suits, with consequent detriment to the orderly and equitable administration of all claims in a single proceeding, which it is the whole purpose of the limitation statute to avoid.

The claims urged in the present actions are incontestably "for the same loss or damage" as those filed in the limitation proceeding. It is equally clear that those claims—although asserted vicariously in actions brought against the underwriters under the state statute—are for claimed "debts and liabilities of the (assured) owner",[35] not for any independent liability of the underwriters themselves. The direct-action statute, in sum, simply compels "the insurer to respond . . . to the obligation of the insured".[36]

This court has held that the stockholders of a vessel-owning corporation—who, under a California statute,

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[33] *Société Napthés Transports vs Bisso Towboat Co.*, 241 Fed. 463, 465 (CA 5-1917), cert. den., 245 US 652.

[34] See, e. g., *Providence & N. Y. SS Co. vs Hill Mfg. Co.*, 109 US 578, 594-5 (1883); *Butler vs Boston Steamship Co.*, 130 US 527, 552 (1889).

[35] See footnote 32, *ante*.

[36] *Ruiz vs Clancy*, 182 La. 935, 941 (1935). In the converse situation, the subrogated insurer correspondingly has, and can enforce, only the claim of his assured. *Southern Bell Telephone & Telegraph Co. vs Watts*, 66 Fed. 460 (CA 4-1895); *Gaugler vs Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79 (DC Mont.-1912). See *Petition of Howlett*, 75 FS 438 (ED NY-1948), holding that the claim of an injured person and of his subrogated insurer constitute one single claim, although each filed separate pleadings in a limitation proceeding.

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were individually amenable to direct actions on the corporation's debts—were entitled to limit their liability with respect to the vessel's tort. Justice Holmes pointed out that "this is not to ignore the distinction between a corporation and its members . . . but to interpret an untechnical word (owner) in the liberal way in which we believe it to have been used—as has been done in other cases'. This court accordingly ruled directly that "having no doubt of the comprehensive purpose of Congress, we should not be ingenious to construe the California (direct-action) statute in such a way as to raise questions whether it could be allowed to interfere with the uniformity which has been declared a dominant requirement for admiralty law".[37]

In another case strikingly close to the instant one, a vessel had been libeled, and released upon posting of bond, after which the vessel-owners petitioned for limitation. Cancellation of the release bond was ordered on the express ground that the liability of both principal and surety on such a bond is subject to limitation, the provisions of the limitation act being "practically written into" the bond.[38]

Similarly, it has been held, in a case in which an eventual petitioner for limitation had filed a supersedeas bond in appealing from a judgment rendered before initiation of the limitation proceedings, that "the obligation

[37] *Flink vs Paladini*, 279 US 59, 63 (1929). See also *The Milwaukee*, 48 F2d 842 (ED Wis.-1931).

[38] *Société Napthés Transports vs Bisso Towboat Co.*, 241 Fed. 463, 465 (CA 5-1917), cert. den., 245 US 652. The Supreme Court of Louisiana, in construing the direct-action statute of that State, has analogized the position of a liability insurer to that of a surety. *Edwards vs Royal Indemnity Co.*, 182 La. 171 (1935).

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of the surety was only coextensive with that of the principal, (and) that the liability incurred under the supersedeas bond was impliedly subject to the enforcement of the limited liability statute, and would be itself superseded, at least *pro tanto*, by the decree limiting such liability".[39]

Marine underwriters obviously issue their policies in contemplation of the provisions of the limitation statute,[40] which are, in fact, written into such policies, as in the case of those at bar, through the "no-action" clause.[41]

D

By prescribing an exclusive remedy for injuries to crew members caused by fault of their employers, the Jones Act precludes the instant actions.

The Court of Appeals held that it was unnecessary to determine the question as to whether a state may extend the provisions of the Jones Act[42] by creating a right of

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[39] The court saw "no merit in the proposition that the surety can be held to full liability, notwithstanding the discharge of the principal". *Monongahela River Consol. Coal & Coke Co. vs Hurst*, 200 Fed 711, 717 (CA 6-1912), cert. den., 226 US 608, 612.

[40] The underwriters "must be presumed to have had in contemplation the system of maritime law under which (the contract) was made". *Union Fish Co. vs Erickson*, 248 US 308, 313 (1919). "One of the prime factors taken into consideration by the P&I underwriters is the ability of a shipowner, in the event of a catastrophe, to limit his liability." *Libby, Some Aspects of Protection and Indemnity Insurance*, 1952 *CCH Insurance Law Journal* 684, 689.

[41] The district court decision in *The Cascade*, 241 Fed. 206 (ED NY-1916), which respondents, on page 11 of their opposition to certiorari herein, incorrectly attribute to an appellate court, conflicts with *Spencer Kellogg Co. vs Hicks*, 285 US 502 (1932); and involved a simple employer's liability policy which expressly declared the insurer primarily liable to injured employees of the assured. Each instant marine policy provides liability thereunder only to the named assured, and only after actual payment of a loss by the assured, or after judicial determination of the assured's liability.

[42] Section 33 of the *Merchant Marine Act* of 1920, 41 Stat. 1007, 46 USC 688, reprinted in Appendix C, *post*, p. 22.

action against an employer's underwriter, because "even if there were no jurisdiction, nor any right of action, under the Jones Act . . . diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3000 is involved in each suit. These circumstances support federal jurisdiction."

This is diametrically contrary to this court's repeated holding that the right of action for fault of a deceased seaman's employer lies against that employer alone, exclusively under the Jones Act which may not be altered or expanded by state law,[43] and which provides no right of action against the employer's underwriter.[44]

E

The McCarran Act does not authorize application of the Louisiana statute to marine policies.

Interpretation of the McCarran Act[45] as sanctioning the application of state direct-action statutes to maritime law and federal legislation, is contrary to this court's holding as to the historical purposes and scope of

[43] *Northern Coal Co. vs Strand*, 278 US 142 (1928); *Lindgren vs United States*, 281 US 38 (1930); *Cosmopolitan Shipping Co. vs McAllister*, 337 US 783 (1949). This phase of the argument applies only to the claims made against petitioners as underwriters of the charterer-employer. See footnote 1, *ante*.

[44] Judge Borah, now a member of the Court of Appeals for the Fifth Circuit, held directly, when on the district bench, that Jones Act suits may not be prosecuted against marine underwriters under the Louisiana direct-action statute. *Sanford vs Zurich General Accident & Liability Ins. Co.*, Civil Action No. 655, Eastern District of Louisiana, Baton Rouge Division (unreported). District Judge Christenberry has reached the same conclusion. *Loviess vs Jahncke Service, Inc.*, Civil Action No. 3121, Eastern District of Louisiana, New Orleans Division (unreported).

[45] 59 Stat. 33, 34, 15 USC 1011, et seq. (relevant portions reprinted in Appendix D, *post*, p. 23).

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that Act, and transgresses the constitutional limitations, also recognized by this court, on the power of Congress to delegate its authority to legislate in maritime matters.

This court has recognized that the sole purpose of the McCarran Act was to remove the ban of the commerce clause from the sphere of state legislation dealing with insurance.[46] In passing the McCarran Act, Congress could not have intended, for it had no constitutional authority, to abdicate to the states its exclusive power to legislate in maritime matters.[47]

Another panel of the Court of Appeals for the Fifth Circuit has, in a later decision, recognized this fact explicitly.[48]

CONCLUSION

Marine insurance policies are issued in contemplation of the maritime law, including the continued effective-

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[46] *Prudential Ins. Co. vs Benjamin*, 328 US 408 (1946). "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." *House Report No.* 143, 79th Cong., 1st Sess., p. 3 (1945), on the bill which became the McCarran Act.

[47] *Detroit Trust Co. vs The Barlum*, 293 US 21 (1934); *Knickerbocker Ice Co. vs Stewart*, 253 US 149 (1920).

[48] "We . . . are of the opinion that the McCarran Act . . . only concerns the power of Congress to sustain existing and future legislation from attack under the commerce clause of the Constitution." *Wilburn Boat Co. vs Fireman's Fund Ins. Co.*, 201 F2d 833, 837 (CA 5-1953). The court also recognized that *Hooper vs California*, 155 US 648 (1895), which was decided with reference to the commerce clause, and not to the maritime law, was effectively overruled in *United States vs South-Eastern Underwriters Association*, 322 US 533 (1944).

ness of the national Limited-Liability Act. Such policies have never been considered subject to the vagaries of state legislation; and the decision below, if allowed to stand, would effect a complete upheaval of the established foundations of the marine insurance business everywhere.[49]

As this court pointed out in *Garrett vs Moore-McCormack Co.*,[50] it is no less important from the point of view of merchant seamen than from that of other maritime interests, that the "dominance of admiralty principles" in maritime causes be maintained.

It is accordingly respectfully submitted that the decision below should be reversed.

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,
RENE H. HIMEL, JR.,
Of Counsel.

April, 1953.

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[49] "This decision is presently causing concern in insurance circles (and) . . . until the situation is clarified there is bound to be some confusion". *1952 Report of the Regular Stated Meeting of the Association of Average Adjusters of the United States*, p. 2552.

[50] 317 US 239, 244 (1942).

APPENDIX A

Louisiana Direct-Action Statute

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed *prima facie* evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such a policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful

conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655.

APPENDIX B

Limited-Liability Act—(Extracts)

"The liability of the owner of any vessel . . . for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

RS 4283, as amended by 49 Stat. 1479, 46 USC 183(a).

"Whenever . . . the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each (claimant) . . . they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose . . . the owner of the vessel . . . may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

RS 4284, as amended by 19 Stat. 251, 46 USC 184.

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels . . ."

RS 4286, 46 USC 186.

"Except as otherwise specifically provided therein, the (foregoing) provisions . . . shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation . . ."

RS 4289, as amended by 49 Stat. 1481, 46 USC 188.

APPENDIX C

Jones Act
(Merchant Marine Act of 1920, section 33)

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions

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shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

41 Stat. 1007, 46 USC 688.

APPENDIX D

McCarran Act—(Extracts)

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

59 Stat. 33, 15 USC 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . ."

59 Stat. 34, as amended by 61 Stat. 448, 15 USC 1012.

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